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No. 236

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE

ON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AMICUS CURIAE

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 102–107) is reported in 103 F. (2d) 450. The opinion of the United States District Court for the District of Minnesota (R. 70–87) is reported in 23 F. Supp. 411.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 24, 1939 (R. 107–108), and a rehearing was denied May 10, 1939 (R. 115). The petition for

certiorari was filed July 28, 1939, and was granted October 9, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a private patron of the mails may sue without the consent of the United States to recover consequential damages resulting from the misdelivery of mail.

STATUTES INVOLVED

Act of June 8, 1872, c. 335, sec. 65, 17 Stat. 293, as amended by the Act of March 1, 1909, c. 232, 35 Stat. 670, and Act of June 15, 1921, c. 18, sec. 304, 42 Stat. 24 (U. S. C. Tit. 39, sec. 34; Postal Laws and Regulations, Sec. 410) provides:

> Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. On the death, resignation, or removal of a postmaster, his bond shall be delivered to the General Accounting Office, * * *

Act of June 8, 1872, c. 335, Sec. 13, 17 Stat. 287 (U. S. C. Tit. 5, Sec. 377; Postal Laws and Regulations, Sec. 62 (1)), provides:

> All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America.

Revised Statutes, Sec. 919 (U. S. C., Tit. 28, Sec. 732; Postal Laws and Regulations, Sec. 285 (2)), provides:

> All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes and all suits arising under the postal laws, shall be brought in the name of the United States.

Other pertinent provisions of the Postal Laws and Regulations are set forth in Appendix A, *infra*, p. 24.

STATEMENT

The petitioner sued to recover for its own use and benefit, from an acting postmaster and his surety, the penal sum of the postmaster's bond. The action was brought in the name, but without the consent (R. 58–60) (see Appendix C, p. 36), of the United States. According to the allegations in the complaint, the facts were as follows:

During the period involved in this case the petitioner was engaged in the business of automobile financing, in the City of Minneapolis, Minnesota (R. 3), and the respondent Malone was the acting postmaster at Montgomery, Minnesota. In the course of its business the petitioner purchased from automobile dealers in various localities negotiable paper secured by automobile sales contracts (R. 3–4). Thomas Hunting, a dealer in Montgomery, Minnesota, sold spurious sales contracts and promissory notes to the petitioner, giving fictitious credit references (R. 6, 8–10). In accordance with its usual practice, the petitioner sent out letters

of inquiry to the credit references, and mailed payment books, insurance certificates, and receipts to the supposed purchasers (R. 6–8).

The complaint alleged that Malone delivered all such mail to Hunting at the latter's request (R. 9–10, 16), thereby enabling Hunting to answer some of the credit inquiries himself, and to forge the documents sent to the supposed purchasers or arrange for the necessary replies (R. 9–10). The complaint alleged that the petitioner was damaged to the extent of $34,997.03, the net sum paid Hunting for the worthless notes and contracts (R. 17, 18). This action was instituted to recover on the respondent's bond as acting postmaster.[1]

The bond (R. 19) named the United States of America as obligee, and was conditioned as follows:

> That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System. * * *.

The respondents' demurrer (R. 25–27) to the complaint on the ground that the action could not be main-

[1] The opinion of the District Court states (R. 84) that the bond in suit was superseded by a new bond when Malone was elevated from acting postmaster to postmaster.

tained without the consent of the United States was overruled (R. 27–30). The objection was renewed by motions to dismiss made at the close of the testimony (R. 61–63, 64–65). Judgment was reserved on these motions (R. 63). After the jury's verdict for the petitioner (R. 63), the surety company's motion to dismiss was granted (R. 67, 70–87).[2] The judgment of dismissal was affirmed on appeal to the Circuit Court of Appeals for the Eighth Circuit (R. 107–108), and this Court granted certiorari.

STATEMENT OF INTEREST OF THE UNITED STATES

The bonding of postmasters provides security to the United States against losses of its funds and property through failure of postmasters to carry out their duties. Recovery in this case will exhaust the penalty of the bond. The same result may be anticipated generally if private actions may be maintained for such claims without the consent of the United States.

SUMMARY OF ARGUMENT

There is no basis in principle or authority for the maintenance of this action without the consent of the United States. The bond is made to the United States as required by statute. The authorities are agreed that in the case of a statutory bond only the obligee may sue unless consent for another to sue can be found in the statute requiring the bond. The act in question here

[2] After the dismissal of the surety company the District Court entered a supplemental order dismissing the action against respondent Malone for want of jurisdiction, both he and petitioner being citizens of Minnesota (R. 88).

admittedly contains no express consent and no implied consent can be discovered.

The statutes, the regulations, and the terms of the bond indicate that the dominant and, we believe, the sole, purpose of the bond is to furnish security to the United States against loss of those of its funds and property for which postmasters are responsible, and that such bonds are relied upon to protect the Government against losses through failure of postmasters to carry out their duties. It is evident that the predominant interest of the United States cannot be protected if private individuals, in suits on the bonds, brought without the consent of the United States, are permitted to recover indirect or consequential damages resulting from misdelivery or delay in the delivery of mail. In this case the petitioner's demand is for the full amount of the bond and will exhaust the security if recovery is allowed. Similar results are to be anticipated generally if such private actions may be maintained.

The United States could not protect itself against such exhaustion of its security by increasing the amount of these bonds to cover consequential private losses. The amount of consequential private damage likely to occur is wholly conjectural and cannot be anticipated even approximately. Therefore the penalty of the bond cannot be fixed in an amount assuredly sufficient to cover such losses in addition to those suffered by the United States.

Nor would the courts have authority to protect the security provided to the United States by postmasters'

bonds if private actions such as this were to be permitted without legislative safeguards. The recognition of priority for claims of the United States and the restriction of the period within which private actions may be commenced require statutory authority.

Procedural considerations likewise support the conclusion that private persons may not maintain such actions without the consent of the United States. An administrative procedure is available to private individuals for the recovery of losses incurred in using the mails, some provisions of which are inconsistent with the view that private suits were contemplated. The paucity of cases involving private actions on postmasters' bonds forcibly indicates that the existing administrative procedure has been generally effective to satisfy all reasonable demands. Moreover, in judicial proceedings commenced by the United States the determination by Postal officials as to whether the Postal regulations have been violated, made in the course of the investigation of private claims required by the regulations, would presumably be entitled to substantial weight. This aid to the correct determination of the rights of the complaining private parties would not usually be available if private individuals were to forego the administrative remedy and seek to enforce their claims directly by private suit.

Existing authority supports the position of the Government. *Howard* v. *United States*, 184 U. S. 676, a case involving a private suit on a court clerk's bond, is

not opposed. The evident purpose of the bond in that case was to protect private litigants as well as the Government. The interest of the Government was relatively small, and the circuit court which appointed the clerk consented to the action. In that case this Court expressly distinguished the situation where the bond is given "primarily" for the protection of the Government (*id.* 691). Moreover, enlargement of the penalty of the clerk's bond was found to be available there as an adequate protection of the interests of the United States (*id.* 690).

ARGUMENT

A PATRON OF THE MAILS MAY NOT SUE ON A POSTMASTER'S BOND WITHOUT THE CONSENT OF THE UNITED STATES TO RECOVER LOSSES CONSEQUENT UPON THE MISDELIVERY OF THE MAILS

The penal sum of the bond in suit is $16,000.00. The petitioner's demand is $16,000.00. Recovery, if allowed, would exhaust the bond and leave the United States without security for payment of any deficiencies which may be discovered in the postmaster's account.

The danger of exhaustion of the bond is not peculiar to this case. The amount of damages which may result from misdelivery or delay in the delivery of mail is unpredictable. If recovery of such damages by private claimants should be permitted it would frequently result in depletion or complete exhaustion of the security now available for the protection of the United States.

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[2] It may be doubted whether damages are properly recoverable for indirect losses of the kind claimed in this case even if the United States had consented to the suit. Every case in which

No means would be available for protecting the security afforded to the United States by postmaster's bonds if such suits were permitted. It is no answer that the penalty of the bond can be fixed in such amount as the Postmaster General deems necessary. It would

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the United States has sued on account of loss to private persons has involved loss of or damage to property in the mails and the claim has been limited to the ascertainable value of the merchandise, money, or other tangible property lost or damaged. Recovery for other losses would appear to be precluded by the settled principle that damages recoverable for breach of contract are limited to those within the contemplation of the parties when the contract was executed. *Hadley* v. *Baxendale*, 9 Exch. 341; *Globe Refining Co.* v. *Landa Cotton Oil Company*, 190 U. S. 540. The analogy of the telegram misdelivery cases is compelling. Since the decision in *Primrose* v. *Western Union Tel. Co.*, 154 U. S. 1, 29-34, it has been settled that, even in the absence of contractual or statutory limitation, a telegraph company is not liable for consequential loss flowing from a delayed, misdirected, or incorrectly transcribed telegram, unless it has been clearly put on notice by the context of the telegram that such damage would result from failure to fulfil the contract of transmittal. *Cf. Western Union Tel. Co.* v. *Hall*, 287 Fed. 297 (C. C. A. 4); *Francis* v. *Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078; *Kelliher* v. *Western Union Tel. Co.*, 126 Minn. 122, 147 N. W. 951. Sealed letters, unlike open telegrams, give no inkling of the damages consequent upon misdelivery, and in this case there is nothing in the record to indicate that the postal authorities were apprised of the likelihood of the type of damage suffered.

The record does not contain the evidence introduced at the trial, the trial court's charge, or the jury's verdict. The District Court's opinion states that "The testimony * * * did not directly establish that Malone [the postmaster] was knowingly a party to the fraud" (R. 72) and states also that Hunting "was able to convince Malone that it was perfectly proper for the 'Midland Mail' to be delivered to him" (R. 72); and the opinion of the Circuit Court of Appeals recites that "It is not claimed that * * * he [the postmaster] had any knowledge of the fraud * * *" (R. 103).

be impossible for the Postmaster General to ascertain the extent to which bond penalties should be enlarged to provide indemnity against losses such as those claimed here and still maintain sufficient protection to the United States. Past experience furnishes a guide to the annual incidence of loss with respect to both Government funds and private property damaged or lost in the mails. The amount of the bond penalty may be fixed accordingly. But experience has not provided, and cannot be expected to provide, any basis for estimating the extent of prospective indirect or consequential losses which may result from misdelivery or delay in delivery of the mails.[1] (See Appendix D, p. 38.)

Nor would the courts have authority to protect the Government's dominant interest in the postmaster's bond if private suits on such claims were allowed. In the absence of express legislation the Government would not be entitled to priority (*Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 239; *United States* v. *Heaton*, 128 Fed. 414 (C. C. A. 3), but, at most, could obtain a pro rata share of the bond penalty (*American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. 25, 126 Fed. 811 (C. C. Maine) affirmed *sub nom. United States* v. *American Surety Co.*, 135 Fed. 78 (C. C. A. 1).

[1] The difficulty of insuring against such losses has received express recognition in the administration of the Post Office Department. With respect to registered or insured mail Sections 1382 (6) (f) and 1389 (6) of the Postal Laws and Regulations provide that no indemnity will be paid "for indirect, remote, and unnecessary expenses incident to repairs or duplication of papers *or for any consequential loss.*" [Italics supplied.]

These regulations would seem to have direct application to claims against the Government for indirect or consequential loss resulting from the mishandling of insured or registered mail.

Private patrons of the mails are in a position to prosecute their claims before the Government has completed settlement of the postmaster's accounts. If the race is to the swift the bond may be exhausted even before any indebtedness to the United States is discovered and whenever that occurs the Government would be denied all possibility of recovery. The substantial effect of ignoring the interest of the United States where, at the time the private suit is commenced no claim of the Government has been made, would be to re-write the statute of limitations applicable to Government suits on such bonds by making the Government's rights wholly subject to the capricious hazards of private litigation.[5]

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[5] There is no suggestion in the petitioner's brief that the United States is barred by statute from suing the surety on any deficiency subsequently discovered in the Postmaster's account. Section 298 (1) (U. S. C., Tit. 39, Sec. 10) of the Postal Laws and Regulations relieves the surety from liability "if on a settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account." The three-year period begins to run only from the date of discovery of the indebtedness, whenever that may be. The word "settlement" means "an administrative determination of the amount due." *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 219. Such determination may be reopened at any time, at least on the discovery of fraud or mistake. *Soule* v. *United States*, 100 U. S. 8, 11; *Moses* v. *United States*, 166 U. S. 571, 594; *Smith* v. *United States*, 14 C. Cls. 114, 118; cf. *United States* v. *Norton*, 107 Fed. 412 (C. C. A. 5); *United States* v. *Eddy*, 28 Fed. 226 (C. C. N. D. Ohio). The word "close" is used interchangeably with the word "settlement" (cf. U. S. C., Tit. 31, Sec. 73) and may reasonably be given the same meaning in this statute. *United States* v. *Cash*, 293 Fed. 584 (C. C. A. 5). While the use of both terms in the same statute suggests that some difference in meaning may have been intended, the word "close" would seem to refer to the final settlement,

Experience has evidenced the necessity of legislative safeguards to protect the Government's interests where private suits are permitted. The Congress found it necessary, for example, to amend the statute permitting private suits on contractor's bonds so as to give priority to the claims of the United States and to forbid private actions until six months after final settlement and completion of the contract. See U. S. C., tit. 40, sec. 270, House Report 2360, 58th Cong., 2d Sess. The statute authorizing private suits on consular bonds expressly gives priority to the claims of the Government. U. S. C., Tit. 22, Sec. 103. In the absence of such

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after the postmaster has left the postal service and all items have been audited, the postmaster's account being treated as a "running account" for the term of his office. See Appendix E. Related statutes and regulations make it clear that the account of a postmaster may be reopened whenever a deficiency is discovered, even after he has left the postal service. Postal Laws and Regulations, Sec. 272 (3); *Id.* Sec. 291, U. S. C., Tit. 28, Sec. 670.

A statute relating generally to actions against sureties of bonded officials provides that the action must be instituted within five years of "a statement of the account" showing any indebtedness to the United States (U. S. C., Tit. 6, Sec. 5; see *United States* v. *United States Fidelity & Guaranty Co.*, 25 Fed. (2d) 500 (D. Md.); *United States* v. *Geise*, 56 Fed. (2d) 583 (C. C. A. 2)) but it is understood that this statute has no application to actions against a postmaster's surety which are expressly governed by U. S. C., Tit. 39, Sec. 40, discussed above.

The Act of July 31, 1894, 28 Stat. 207, § 8, governs only the relations of the Comptroller General and the Executive Departments. See note in U. S. C. A., Tit. 31, p. 13. The ambiguity in the Act as set forth in U. S. C., Tit. 31, Sec. 74, results from the substitution of "General Accounting Office" for "Auditors" and "Comptroller General" for "Comptroller of the Treasury." The substitution was no doubt made because of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, U. S. C., Tit. 31, Sec. 44.

statutory regulation the courts should be slow to imply an authority to sue without the consent of the United States.*

These considerations have been deemed sufficient reason to deny private persons the privilege of suing on official bonds in their own right. In *Fosmire* v. *National Surety Company*, 229 N. Y. 44, an action was brought by a laborer to recover wages from his employers, contractors for the construction of a state highway, on their bond executed under the Highway Law of New York. The conditions of the bond were that the contractors pay the wages of their laborers, perform the work faithfully and on time, and protect the state against all excess costs or damages occasioned by the work. Even though the bond was clearly intended to cover payment of wages, the right to maintain the suit was denied. Speaking for the Court, Judge Cardozo declared:

> We think the cause of action is in favor of the People solely [citing cases]. In so holding, we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like

* The brief of petitioner sets forth excerpts from the letter of Assistant Attorney General in response to petitioner's request that the Government consent to the maintenance of this action. No indication of omissions is given. See Brief of petitioner, pp. 162–163. In order that the Court may have the full text, the letter is set forth in Appendix C, *infra*, p. 36, especially because of the emphasis which petitioner attaches to the language selected for quotation to support a claim that the United States has no interest in this litigation. Particular attention is directed to the last two paragraphs of the letter.

position should have the right to sue upon it. If that intention is absent, the right to sue will be denied [citing case]. * * * The dominant purpose of this bond was protection to the state. That is plain alike from its terms and from those of the statute which required that security be given (Highway Law, *supra*). This dominant purpose will be defeated if laborers may ignore the People, and sue in their own right. They may then sue for wages as often as there is default, and exhausting the penalty of the bond, leave nothing for the state. * * * The state did not intend to make the employees of its contractors the beneficiaries of a cause of action to be enforced in hostility to its own. There is nothing far-fetched or visionary in the danger that would follow the recognition of such competing claims of right. * * *

The plaintiff fails, therefore, to establish that he and his fellow laborers were the donees of a right to sue. * * * The concession of such a right would do more than frustrate the purpose of the bond. It would frustrate the purpose of the statute which directed that a bond be given. The statute does not permit, and the Commission in exacting the bond did not intend, that the security should be exhausted at the instance and for the benefit of persons other than the state itself. * * *

These observations apply with equal force to the bond involved in this suit. The United States is the sole obligee. Unless authority can be drawn from the statute requiring the giving of the bond, no one other than the obligee may sue. *Corporation of Washington* v. *Young*, 10 Wheat. 406; *Howard* v. *United States*,

184 U. S. 676, 691; *District of Columbia, to Use of Langellotti* v. *Fidelity & Deposit Company*, 271 Fed. 383 (App. D. C.); see *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, 231, 234; *Munroe* v. *Raphael*, 288 U. S. 485, 488–489; *United States* v. *United States Lines*, 24 F. Supp. 427 (S. D. N. Y.).

The statutes requiring postmasters' bonds contain no express statutory consent to suits by private persons, although the Congress has given such consent in the case of certain bonds required of marshals, consuls, bankruptcy officials, and contractors.[7] We submit that no authority to sue may be implied.

The "dominant" and, we believe, the sole purpose of the bond is to protect the interest of the United States. The importance of such bonds as security for the proper performance of the postmaster's duties is evident from the extent to which public property and funds are entrusted to postmasters in the performance of their official duties.[8] As appears on the face of the bond in suit, a postmaster is a "fiscal agent" of the United States. In that capacity he is responsible for deposits in the postal savings, for funds transmitted pursuant to money orders, for stamp accounts of the post office, and for the salaries of postal employees.[8] As evidence

[7] U. S. C., Tit. 28, sec. 500; U. S. C., Tit. 22, Sec. 78, 103; U. S. C., Tit. 11, Sec. 78 (Supp.) (bankruptcy); U. S. C., Tit. 40, Sec. 270. The express provision for private suit on a marshal's bond was adopted in 1806 (Act of April 10, 1806, 2 Stat. 373) apparently in response to a suggestion of the Attorney General that such provision was desirable, even if unnecessary. See 1 Op. Atty. Gen. 92 (1800).

[8] These responsibilities by no means exhaust the duties of a postmaster which include the handling, custody, or disburse-

of the magnitude of the postmaster's accounts it is sufficient to note that domestic money orders alone were issued in the amount of over $2,000,000,000 (see Annual Report of the Postmaster General for fiscal year ended June 30, 1938, p. 170).

The detailed provisions established by the Congress and the Postmaster General with respect to postmasters' bonds make it evident that such bonds are relied upon as the Government's principal security against deficiencies in postmasters' accounts. Provision is made, for example, for the periodic examination and renewal of official bonds (Postal Laws and Regulations, Sec. 69, 414); penalties are provided for the failure of postmasters to render accounts (*id.*, sec. 269); the liability of sureties in the event of a vacancy in the office of postmaster is defined (*id.*, sec. 415, 416); and the rates and financial and legal responsibility of sureties are regulated (*id.*, 70–72).[*] See Appendix A, p. 24.

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ment of other public funds or property, as is indicated by Appendix B, p. 34.

[*] Bonds are required also of other post-office employees having authority to disburse public funds (*id.*, sec. 27 (1); Sec. 10 (7); sec. 472, 473 (6), (7)) and all postal employees authorized to sign checks (*id.*, sec. 422).

The extent of reliance on the postmaster's bond is evidenced by note to Section 473 of the Postal Laws and Regulations covering the bonds of certain assistant postmasters and postal employees:

"The taking of bonds by the United States directly from assistant postmaster and clerks in post offices does not in anywise affect the liability of postmasters upon their official bonds for the proper discharge of all the duties of their office and the due accounting for all public funds which may be in, or come into, their

The Postal Laws and Regulations indicate also that the Government alone was intended to be protected. Thus notice must be given to the surety by the Postmaster General when a deficiency is discovered in the accounts of the postmaster, whereas no provision is made with respect to notice of claims of private patrons (*id.*, sec. 283 (2) U. S. C., Tit. 39, sec. 37). Likewise, the statutory period within which suit may be brought on the surety bond applies only to actions on account of indebtedness to the United States. (*Id.*, sec. 298 (1)).[19]

The letters from the Chief Inspector of the Post Office Department and from the Acting Comptroller General prepared for the information of the Court and attached to this brief as Appendices D and E show that a substantial percentage of the annual collections made by the United States on account of defaults or defalcations of postmasters are recovered from the surety, that the recovery may exhaust the amount of the bond,

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custody as postmaster; and postmasters and their sureties are responsible on their official bonds to the same extent as theretofore for the defaults and defalcations of their subordinates. *The bonds taken from assistants and clerks in post offices are simply additional security of which the United States may avail itself in case of loss.*" [Italics supplied.]

This note has appeared in all editions of the Postal Laws and Regulations since 1902. Edition of 1902, sec. 313; ed. of 1913, sec. 317; ed. of 1924, sec. 355; ed. of 1932, sec. 473, note.

[19] The provisions of the Postal Laws and Regulations requiring bonds of certain assistant postmasters and cashiers "and when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees in such offices" is also some indication that the Congressional legislation in this field was intended to protect the Government alone (*id.* sec. 472; U. S. C., Tit. 39, sec. 132).

and that, in some cases, losses are not discovered until long after the default or defalcation occurred. These facts not only bear witness to the importance of these bonds as security to the United States but also indicate the administrative difficulties which would attend the adoption of a doctrine permitting private suit without the consent of the United States.

The fact that the value of the postmaster's bond as security to the United States may be substantially impaired is sufficient ground for denying private individuals the right to sue without the consent of the United States on claims of the character and amount asserted here. But procedural considerations also point to the conclusion that such actions should not be allowed. Thus, Section 816 of the Regulations of the Post Office Department (see Appendix A) establishes a complete and systematic procedure for ascertaining the facts respecting loss to Post Office patrons and for the collection, by the United States, of damages for such losses. The determination of the Chief Inspector of the Post Office Department on the question whether any regulation has been violated would be entitled to substantial weight in a judicial proceeding instituted by the United States for the recovery of private losses. Cf. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 509; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Decatur* v. *Paulding*, 14 Pet. 497, 515. If, however, suits may be brought by private persons to enforce private claims directly, the departmental examination and determination may not be available as an aid to the court, since Section 816, although it permits the private claimant to submit his claim in advance to the Post Office Depart-

ment, does not require him to do so.[11] It is difficult to believe that Congress, in merely requiring bonds for the Government's protection, contemplated that private individuals would thereby be enabled, by bringing actions directly on such bonds, to require the courts to make independent determinations of questions affecting the day to day administration of the Post Office Department. Certainly the Post Office Department has not so construed the statute.

The regulatory scheme for the determination and enforcement of private claims has been devised on the assumption that the responsibility for investigation and recovery rests with the Government and cannot easily be reconciled with allowance of private actions. Thus Section 813 (1), (2), (4) of the Postal Laws and Regulations requires postmasters to report all claims to the appropriate departmental officials and forbids them to compromise any such claims. The obvious purpose of these provisions is to apprise the Department of maladministration in any of the post offices throughout the United States. If a postmaster may be sued directly by private individuals it is difficult to see how the prohibition against compromise can be enforced. And certainly the regulation plainly shows that the postal laws are administered on the assumption that private actions cannot be maintained.

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[11] The potential importance of this consideration is evident from the fact that the petitioner devotes much of its brief to an effort to show that the misdelivery of its mail was a violation of postal regulations.

It is evident from the face of Section 777 of the Postal Laws and Regulations that the postmaster is authorized to exercise considerable discretion where mail is claimed by a person other than the addressee. See Appendix A, p. 24.

Long experience under the statute indicates that the interests of private parties may be adequately protected without resort to the procedural innovation of private suit.[12] The United States has often instituted suits on postmasters' bonds after investigation under Section 816 of the Postal Laws and Regulations when necessary to obtain recovery for such losses. See *infra*, page 32. The paucity of cases in which private parties have sought to sue without the consent of the United States is itself strong evidence that there is no need for the remedy of private suit.[13]

The few courts which have passed on the question involved here have held that a private suit may not be maintained. *Wile* v. *United States Fidelity & Guaranty Company*, 6 Alaska 48; *Idaho Gold Reduction Company* v. *Croghan*, 6 Idaho 471, 56 Pa. 164; see *United States* v. *Griswold*, 8 Ariz. 453, 457; 76 Pac. 596, 597. A persuasive analogy is furnished by the cases denying a private user of the mails the privilege of suing a mail contractor for breach of contract of carriage with the United States. *German Alliance Insurance Company* v. *Home Water Supply Company*, 226 U. S. 220, 231; *United States* v. *United States Lines Company*, 24 F. Supp. 427 (S. D. N. Y.).

[12] Substantially the same statutory requirement has been in effect at least since 1825. Act of March 3, 1825, 4 Stat. 103.

[13] It is not suggested that the Post Office Department would aid in the collection of claims of the character asserted here. In all probability, the Department would refuse to proceed against the postmaster or surety in such cases for the reasons advanced in this brief, see Appendix D, p. 38.

Howard v. *United States*, 184 U. S. 676, does not sustain the petitioner's position. In that case the plaintiff sued to recover funds tendered to him in another action and deposited with the clerk of the court. The clerk died without accounting to the plaintiff. With the consent of the circuit court which had appointed the clerk, the plaintiff brought suit in the name of the United States, but for his own use, against the sureties on the clerk's bond. The United States was the obligee of the bond, which was conditioned upon the faithful performance of the duties of the office and the seasonable recording of "decrees, judgments, and determinations of the court." The plaintiff's right to maintain the action was upheld.

This Court pointed out that the bond in that case was intended to cover loss to private litigants as well as loss to the Government. The Court stressed the predominance of private litigation in the federal courts (id. p. 687); the "practice of a century" with respect to clerk's bonds (id. 687); and the specific reference in the statute to the duty of recording the court's decrees and judgments (id. 687, 692), a duty which was obviously imposed for the private suitors' benefit. In the absence of a statute forbidding suit, the right to sue was deemed to follow from the conclusion that the bond was intended to protect private litigants (id. pp. 692, 694).

It is doubtful that postmasters' bonds cover any loss in which the United States has no legal interest. There are cases permitting the United States to recover the full value of private property lost or damaged in the

mails [13] regardless of the amount, if any, for which the property was insured or registered, even though the United States is not liable for the loss." [14] But in these cases the recovery has been limited to the value of the property lost or damaged, and the right of the United States to recover has been rested on the ground that the United States, as bailee, has a special property right in the mails, entitling it to recover the full value of such property in the event of loss. The principles which govern such decisions are inapplicable to a claim for consequential damages in which the United States obviously has no legal interest.

Even if it be assumed, however, that postmasters' bonds are intended as direct security for private losses, the *Howard* case furnishes no authority for this suit. The "dominant" purpose of the clerk's bond involved in the *Howard* case was evidently to protect private litigants, to whom the clerks were held to have a "pecu-

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[13] *National Surety Company* v. *United States*, 129 Fed. 76 (C. C. A. 8th); *American Surety Company* v. *United States*, 133 Fed. 1019 (C. C. A. 5th); *United States* v. *American Surety Company*, 163 Fed. 228 (C. C. A. 4th); *United States* v. *American Surety Company*, 155 Fed. 941 (N. D. Ill.); *Gibson* v. *United States*, 208 Fed. 534 (C. C. A. 1st); *United States Fidelity & Guaranty Co.* v. *United States*, 229 U. S. 397 (C. C. A. 8th); *United States Fidelity & Guaranty Company* v. *United States*, 246 Fed. 433 (C. C. A. 9th); *United States* v. *United States Fidelity & Guaranty Company*, 247 Fed. 16 (C. C. A. 6th); *United States* v. *Griswold*, 8 Ariz. 453; *cf. Mass. Bonding & Insurance Company* v. *United States*, 54 Fed. (2d) 1039 (C. C. A. 7th).

[14] The Act of June 28, 1902, 47 Stat. 338 (U. S. C., Tit. 39, secs. 381, 381a, 384, 384a), requires the full value of registered or insured mail to be declared unless otherwise prescribed by the Postmaster General, and provides that "any claim for indemnity in any suit involving such mail, when the full value knowingly and wilfully was not stated at the time of mailing, shall be invalid." (U. S. C., Tit. 39, Sec. 381a).

liar relation" (*id.* 694). The United States did not indicate in that case that the maintenance of the action would jeopardize its interests, and the Circuit Court, which had appointed the clerk, approved the sureties and fixed the amount of the bond, had given its consent to the suit. The opinion expressly declares that the decision has no application where the bond is given "primarily" to protect the United States (*id.* 691). On this ground, the Court distinguished *Corporation of Washington* v. *Young*, 10 Wheat. 406, in which "the first bold adventurer" was denied the right to sue on an official bond without the Corporation's consent. The action in that case was to recover prize money on the bond of the manager of a lottery drawn to effect a public improvement. Moreover, in the *Howard* case the Court found that the Government's interest in clerks' bonds could be protected by enlarging the penalty (*id.* 690). Such protection, as we have shown, is not available against the consequential damage asserted in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

ROBERT H. JACKSON,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

MELVIN H. SIEGEL,
ROBERT K. MCCONNAUGHEY,
Special Assistants to the Attorney General.

OSCAR H. DAVIS, *Attorney.*

JANUARY 1940.

APPENDIX A

POSTAL LAWS AND REGULATIONS

SEC. 69. Every officer required by law to take and approve official bonds shall cause the same to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon; and every officer having power to fix the amount of an official bond shall examine it to ascertain the sufficiency of the amount thereof and approve or fix said amount at least once in two years and as much oftener as he may deem it necessary.

2. Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The nonperformance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of Title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal. Nothing in said sections

shall be construed to repeal or modify section 38 of Title 39: *Provided,* That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title. (U. S. C., tit. 6, sec. 2, 3).

SEC. 70. Wherever, by the laws of the United States, or regulations made pursuant thereto, any person, firm, or corporation is required to furnish any recognizance, stipulation, bond, guarantee, or undertaking, United States Liberty bonds, or other bonds of the United States, will be accepted by the Post Office Department in lieu of individual or corporate sureties in accordance with the general regulations of the Department of the Treasury set out in circular No. 154 of that department, based upon the authority of section 1126 of the revenue act approved February 26, 1926.

SEC. 71. Official bonds, contracts, and undertakings executed by a company authorized to do business under the provisions of sections 6 to 13 of the United States Code, Title 6, will be accepted, provided such company is incorporated and has its principal office within the State or Territory or District of Columbia, or has an agent upon whom process can be served within the United States judicial district wherein the suretyship is to be undertaken.

2. Whenever any official bond or undertaking is required to be given with two or more personal sureties, the execution thereof solely by a surety company shall be sufficient.

3. No officer of the Post Office Department or Postal Service shall require or exact the execution of any official bond, contract, or undertaking by a surety company, or by any particular surety company.

4. Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight. The United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States. (U. S. C., Tit. 6, sec. 14.)

5. On every bond of an officer or employee of the Postal Service accepted from any surety or bonding company there shall appear a certificate, signed by the person signing for the surety or bonding company, stating the amount of the premium per $1,000 on said bond and the rate of premium charged by said company for a like bond during the calendar year 1908, where such bonds were issued by said company during that year. If no such bond was issued during said year, that fact shall be stated.

SEC. 72. No company having authority under the provisions of sections 6 to 13 of the United States Code, Title 6, to do business with the United States shall be accepted as sole surety on any recognizance, stipulation, bond, or undertaking under this department the penal sum of which is greater than 10 percent of the paid-up capital and surplus of such company.

2. Two or more companies may be accepted as sureties on any recognizance, stipulation, bond, or undertaking under this department the penal sum of which does not exceed the limit herein prescribed of their aggregate paid-up capital and surplus; and in such cases each company may limit its liability, in terms, upon the face of the bond, to a definite specified amount, such amount to be in all cases, however, within the limitations herein prescribed. In cases where the law ex-

pressly or impliedly requires or contemplates it, every such recognizance, stipulation, bond, or undertaking shall be executed by the principal and sureties jointly and severally.

3. No company shall be accepted as surety on any recognizance, stipulation, bond, or undertaking under this department which shall execute any recognizance, stipulation, bond, or undertaking on behalf of any individual, firm, association, or corporation, whether or not the United States is interested as a party thereto, the penal sum of which is greater than 10 per cent of the paid-up capital and surplus of such company, except under the conditions and limitations herein prescribed.

4. No portion of any recognizance, stipulation, bond, or undertaking shall be included in determining the limitations herein prescribed which shall have been reinsured at the time of execution and delivery of the original obligation, or within 20 days thereafter, in a company authorized to do business under the act above referred to, within the limitations herein prescribed, or in such companies and under such limitations as the Secretary of the Treasury shall have approved: *Provided,* That on every such recognizance, stipulation, bond, or undertaking in which the United States is interested as a party, the reinsurance agreement shall be executed simultaneously with the original obligation by a company authorized to do business under the act of August 13, 1894, and shall run directly to the United States.

5. The amount of paid-up capital and surplus of every such company shall be determined by the annual and quarterly financial statements filed with the Secretary of the Treasury as herein provided, or by reports upon current examinations made by the insurance departments of the several States or by the Attorney General of the United States. The Secretary of the

Treasury will keep the other executive departments advised, from time to time, as to the status and qualifying power of the various companies under these instructions.

6. In the event that it becomes necessary to waive the limitations herein prescribed on any recognizance, stipulation, bond, or undertaking given to the United States, notice of such waiver and the manner in which the excess is required to be covered shall in each instance be immediately transmitted by letter to the head of each of the other executive departments.

7. Failure on the part of any company to comply with the provisions of these regulations will be considered sufficient ground for refusing to accept further such company as surety on obligations under this department during the continuance of such delinquency, and in the event of persistent failure to observe the provisions of these regulations the name of any such company will be eliminated from the published list of securities acceptable to this department.

SEC. 269. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond (U. S. C., tit. 39, sec. 44).

SEC. 415. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and

his sureties shall be responsible under their bond for the safekeeping of the public property of the post-office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice, in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent (post-office inspector) until the vacancy can be regularly filled; and when such special agent shall have taken charge of such post office, the liability of the sureties of the postmaster shall cease (U. S. C., tit. 39, sec. 38).

SEC. 414. Postmasters shall furnish new bonds whenever deemed necessary by the First Assistant Postmaster General; also upon the death, insolvency, or other disability of one or more of the personal sureties on the postmaster's bond, or whenever any postmaster under bond with personal sureties shall have remained in office for four years from the effective date of his last official bond. (See sec. 69.) Postmasters shall promptly report to the department the death, insolvency, or other disability of a personal surety, and failure to do so will be deemed sufficient cause for removal.

SEC. 416. Whenever the office of a postmaster becomes vacant through death, resignation, or removal, the Postmaster General shall designate some person to act as postmaster until a regular appointment can be made by the President in case the office is in the first, second, or third class, and by the Postmaster General when the office is in the fourth class; and the Postmaster General

shall notify the General Accounting Office of the change. The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property pertaining to the post office and the performance of the duties of his office until a regular postmaster has been duly appointed and qualified and has taken possession of the office. Whenever a vacancy occurs from any cause the appointment of the regular postmaster shall be made without unnecessary delay . . . (U. S. C., tit. 39, sec. 39).

SEC. 777. Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word "Personal" in connection with the address shall be delivered as other mail for the addressee is delivered.

3. A letter addressed to a person imprisoned to await trial, upon indictment or pending indictment, shall be delivered in accordance with the order of the person addressed. In the absence of an order the mail may be delivered to the sheriff or officer having charge of the prisoner.

4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value.

5. Where two or more persons of the same name receive mail at the same office the postmaster shall advise

them to adopt some address or means by which their mail may be distinguished. Postmasters may deliver such matter according to their best judgment, and shall not return it to the mailing office for better description of the addressee until after inquiry they are unable to determine to whom it should be delivered.

6. Mail matter addressed to a person in care of another shall be delivered to the addressee, if he so direct, and not to the person to whose care it is addressed. In the absence of such direction it shall be delivered to the first of the two persons who may call for it (see Sec. 778).

7. Mail matter addressed to several persons may be delivered to any one of them.

8. Mail matter addressed to a public official or to an officer of a corporation by his official title shall be delivered to the person actually holding the office designated in the address.

9. Neither husband nor wife can control the delivery of matter addressed to the other. When so instructed, a postmaster shall refuse to deliver mail to the husband which is addressed to the wife, or mail to the wife which is addressed to the husband. In the absence of instructions to the contrary the wife's mail should be placed with the husband's and delivered to him with his own, unless they be known to live separately.

10. A person engaged in a legitimate business may adopt a business name, and, when duly identified, may receive his mail, registered or ordinary, by that name as well as by his proper name.

11. Any number of citizens may employ an agent and give him a written order on the postmaster for their mail; and when such order is presented to the postmaster the mail for such parties, and also mail addressed to a person in care of any such parties, shall be delivered to the agent named.

12. Mail matter of patrons of a post office shall, at their request, be delivered to a star or rural carrier to be carried out of the mail and handed to them on his route before he passes another post office.

13. In all cases of dispute as to the person or persons to whom mail should properly be delivered, where the postmaster is in doubt as to his duty under the regulations, he shall obtain written statements from the contending parties as to the grounds of their claims, and submit such statements, with a full report of his own, to the Solicitor for the Post Office Department, for advice in the premises.

SEC. 816. The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.

2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.

3. The Chief Inspector in such cases shall communicate the facts to the officer having charge of the employee or service with information of any collection made or contemplated, for consideration of the advisability of imposing fine or of taking other disciplinary or corrective measures. The amount of the fine or the character of disciplinary action taken or proposed to be taken shall upon request be reported to the Chief Inspector by such officer.

4. When collection is made under the provisions of this section a receipt shall be given on a form furnished by the department showing the amount, the case num-

ber, a description of the mail, and the grounds on which the collection is based.

5. If after payment the propriety of the collection is questioned, the matter may be taken up by the person from whom the collection was made through his superior officers, but this shall be done within 30 days from the date of the collection. Any statement which it is desired to submit shall be forwarded promptly through official channels to the office having the employee or service in charge for transmission to the Chief Inspector; at the same time the officer with whom it is originally filed shall immediately notify the Chief Inspector that a statement has been submitted. Unless the Chief Inspector sustains the propriety of the collection, the money shall be returned. This information shall be printed on the receipt mentioned in paragraph 4.

6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.

8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be payable and recovery cannot be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection.

APPENDIX B

SOME SECTIONS OF THE POSTAL LAWS AND REGULATIONS IMPOSING DUTIES ON POSTMASTERS RELATING TO THE PROPERTY AND FUNDS OF THE UNITED STATES

Section 58: Providing for the responsibility of postal employees for Government property lost or damaged through their fault.

Sections 105–117, 119–126, 128–130: Providing in great detail for the care, deposit, accounting, and transmission of the public moneys, collected by postmasters, or coming into their possession.

Sections 137, 138, 139, 143, 145, 148, 149, 150, 151, 579, 765: Dealing with the postmasters' duties concerning stamps, stamped envelopes and paper, and mailing matter without postage stamps affixed.

Sections 152–155: Accounting by postmasters for stamps and stamp paper charged to them, and for redeemed stamps.

Sections 156–157: Duties with respect to internal revenue stamps, and Government securities.

Sections 228, 234, 235, 236, 237, 238, 239, 242, 1778: Prescribing the duties of the postmaster as a disbursing officer.

Sections 106, 443: Holding the postmaster responsible for loss of Government funds or property if he fails to exercise due care.

Sections 474–480, 482–3: Expenditures of postmasters for leases, supplies, letter boxes, etc.

Section 584: Duties of postmasters with respect to refunds of overcharges on mail matter.

Sections 1369–70: Duties of postmasters with respect to registered matter, and their responsibility for loss.

Sections 1408, 1426, 1430 (21), 1493–4, 1520–1: Dealing with the postmaster's responsibility for money-order funds.

Sections 1608, 1613–19, 1626–1627: Duties in connection with postal-savings funds.

Sections 1866–70, 1877, 1879–90, 1894–97: Duties concerning the care of mail bags, locks and keys, and responsibility for their loss or injury.

Sections 2230 (15, 16), 2231 (8, 9, 11): Collections of customs duties by postmasters.

APPENDIX C

JWM:WSW WSW:mm
78-39-4 SEPTEMBER 22, 1936.

LEONARD, STREET & DEINARD,
Attorneys at Law, Andrus Building,
Minneapolis, Minnesota.

SIRS: Receipt is acknowledged of your letter of July 15, 1936, requesting the Attorney General to grant leave to you to bring suit against the bond of Patrick J. Malone, Acting Postmaster at Montgomery, Minnesota, on behalf of your client, the Midland Loan Finance Company of Minneapolis.

It is alleged that this company was defrauded to the extent of $40,000 by reason of a collusive agreement between the Acting Postmaster and one Thomas Hunting, an automobile dealer of Montgomery, Minnesota, in accordance with which fraudulent scheme the Acting Postmaster delivered mail posted by the Finance Company to Hunting, regardless of the names to which such mail was addressed, and as a result of which the Finance Company was prevented from discovering the fact that many of Hunting's contracts which it financed were forged.

This is not a case in which the right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client and can be asserted only by your client. It is, therefore, unlike the case of United States ex rel. Brimberg Bros. v. Globe Indem-

nity Company, 26 F. (2d) 191, referred to in your letter.

The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this Section are liable to your client on a claim of the nature stated by you, is a question of law which would not be affected by any action of the Attorney General.

As to the merits of the case, I am advised that the Post Office Department after a thorough investigation of the facts has exonerated the Acting Postmaster and his subordinates from any guilt in the matter.

In these circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it; and further, that in view of the exoneration of the Acting Postmaster by the Post Office Department, it would seem improper for the Attorney General to take any action which would appear to sanction the suit.

Respectfully,

(Signed) JAMES W. MORRIS,
Jas. W. Morris,
Assistant Attorney General.
(For the Attorney General).

APPENDIX D

Division of
Financial Investigation

In Reply Refer to:
76107–C

POST OFFICE DEPARTMENT,
CHIEF POST OFFICE INSPECTOR,
Washington, January 3, 1940.

The Honorable THE SOLICITOR GENERAL,
Department of Justice.

MY DEAR SIR: This is in response to your letter of December 26, 1939, inquiring whether a substantial part of the collections made annually by the Post Office Department on account of deficiencies in postmasters' accounts are obtained from sureties.

In cases involving public funds and the Government's indemnity liabilities, the portion collected from sureties is about 25 percent of the combined recoveries from postmasters, employees, and sureties, whereas, in cases involving ordinary mail, with no indemnity liability, the part collected from sureties is approximately 40 percent.

You inquire also:

> (a) Whether there are large numbers of claims for consequential damages resulting from delay or misdelivery of the mails in addition to the usual claims for property lost in or stolen from the mails.

It has never, so far as can now be determined, been the policy of the Department to recognize claims for consequential damages, as distinguished from claims for the value of the material contents of mail matter. This

position of the Department is so thoroughly understood throughout the postal service that practically any responsible officer to whom such a claim was presented would reject it, and there is therefore no centralized record or consolidated experience affording any indication of the volume or size of such claims. However, there has been sufficient experience to indicate that if recovery were allowed, such claims would frequently be made and for large sums.

In our opinion, adequate provision could not be made for such claims in fixing the penalty of the bond. At the present time, provision is made for the usual case of loss or damage to private property in the mails on the basis of past experience. The damages in such claims are usually quite small. For example, the average sum collected in the fiscal year 1939 in cases involving the intrinsic value of mail matter was only $38.64. The Department's experience with respect to claims for consequential damages, while limited, has been sufficient to indicate that damages of such character are frequently large and unpredictable. In our judgment, there is no practical basis upon which to estimate such losses in fixing the penalty of the bond.

If the senders of mail matter were permitted, without the consent of the Department, to sue on bonds of postal employees, the penalties of many bonds would become obligated for the satisfaction of private claims, leaving the Department without surety protection for the public funds, property, and intrinsic value of mail matter in the custody of the principals. Where consequential damages are involved, the amounts claimed are likely, moreover, to run far in excess of the intrinsic value of the mail matter; for example, the amount claimed in this case, $16,000, may be compared with the average sum of $38.64 collected during the fiscal year 1939 in all cases involving the intrinsic value of mail

matter. Actions, whether for direct or consequential damages, pressed by private persons lacking appreciation of postal operating conditions, would, if permitted, harass postal employees and interrupt their attendance upon official business and thereby interfere with the Postmaster General's management of the postal establishment.

Very truly yours,

K. P. ALDRICH,
Chief Inspector.

APPENDIX E

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, January 3, 1940.

B–7810.

Re *United States of America, for the Use and Benefit of Midland Loan Finance Co., a Corporation, Petitioner,* v. *National Surety Corp., a Corporation, and Patrick J. Malone.* Sup. Ct. No. 236.

THE ACTING SOLICITOR GENERAL,
Department of Justice.

SIR: I have your letter of December 26, 1939, requesting that you be furnished information for use in connection with the above case as to "the extent to which (a) the Post Office Department Division of the General Accounting Office collects from the sureties on these bonds in order to make up deficiencies in postmasters' accounts; (b) the recovery from the surety, either by reason of legal action or voluntary payment, exhausts the penalty of the bond; and (c) deficiencies in a postmaster's accounts are discovered long after the default or defalcation occurred."

In reply you are advised that the Chief of the Postal Accounts Division of this office has reported the facts to be as follows:

(a) During the quarter ended June 30, 1939, sureties on the bonds of former postmasters deposited to the credit of their principals $15,805.15 in 87 cases. These amounts ranged from $3.14 to $2,768.26. Using these figures as a basis, it is esti-

mated they would deposit during a year approximately $54,200 in 300 cases. The total amount actually deposited to the credit of former postmasters during the fiscal year 1939, from all sources, was $126,265.85.

(b) The accounts of the 183 postmasters who went out of office during the fiscal years 1935, 1936, 1937, and 1938, on which there were balances due the United States on March 31, 1939, showed that at that time the sureties had deposited the full penalty of the bond on thirteen of said accounts.

(c) There are cited the following recent cases of deficiencies in former postmasters' accounts which were not found and reported until some time after they occurred:

(1) A postmaster went out of office June 26, 1938, with a balance due the United States on account of an alleged loss by burglary June 1, 1938. The Postmaster General disallowed the claim June 30, 1939, under the act of March 17, 1882, 22 Stat. 29, as amended.

(2) A postmaster went out of office May 6, 1938. Under date of February 27, 1938, the Postmaster General issued an order to charge his account with $2,959.53 as illegal commissions on cancellations of stamps during the fiscal years 1928 to 1938, inclusive, under the act of June 17, 1878, 20 Stat. 141, as amended by the act of June 18, 1934, 48 Stat. 989. Similar cases are numerous.

(3) There have been many cases where postmasters have had funds on deposit in a bank when it closed. In such cases dividends have been paid from time to time over a number of years and the surety companies have refused to pay any

amount until the final dividend had been received and the balance due the United States could be definitely determined.

It may be noticed that postmasters' accounts are "running" accounts, the amount due the United States being determined at the conclusion of the postmasters' services when the account is finally settled. *Jones v. United States*, 7 How. 681, 692; *United States v. Cash et al.*, 293 Fed. 584.

The money-order business was established in 1865, and at present all post offices (44,400) issue and pay domestic money orders. As money orders are payable by postmasters for one year from the last day of the month of issue (act of January 27, 1894, 28 Stat. 32), considerable time elapses before all money orders issued by a postmaster are paid and received in this office and verified. At the time of verification of the last list of money orders issued, rendered by a former postmaster, there may be a number of money orders outstanding and unpaid, and claims for payment thereof may be received several years later. See act of May 27, 1908, 35 Stat. 416.

It is questionable whether a postmaster's account can be considered "closed" by audit and settlement until all outstanding money orders are received and verified with the record required by law to be kept by this office.

Respectfully,

R. N. ELLIOTT,
Acting Comptroller General of the United States.

U. S. GOVERNMENT PRINTING OFFICE 1940

SUPREME COURT OF THE UNITED STATES.

No. 236.—October Term, 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, Petitioner, *vs.* National Surety Corporation and Patrick J. Malone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 5, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

The question presented is whether petitioner, a private user of the mails, may without the consent of any officer of the United States bring suit on the bond of an acting postmaster for consequential damages resulting from misdelivery of mail. The Circuit Court of Appeals for the Eighth Circuit affirmed a judgment of the District Court for the District of Minnesota dismissing petitioner's complaint.[1] We granted certiorari[2] because of an alleged conflict with a decision of this Court[3] and because an important question in the administration of the postal laws was involved.

The complaint alleged that petitioner was engaged in the business of automobile financing in Minneapolis, in the course of which it purchased from automobile dealers the installment notes of buyers secured by their sales contracts. A dealer living at Montgomery, Minnesota, where the respondent Malone was acting postmaster, is alleged to have put into operation a scheme to defraud petitioner by selling it forged notes and contracts, which he sent petitioner along with a fictitious list of credit references. Petitioner, before purchasing, followed its usual practice of mailing letters of inquiry to the references, and after purchasing mailed payment books, insurance certificates, and receipts to the purported makers of the notes. The dealer persuaded the acting postmaster Malone, al-

[1] 103 F. (2d) 450, affirming, 23 F. Supp. 411.

[2] 308 U. S. —.

[3] Howard v. United States, 184 U. S. 676.

legedly in violation of the Postal Regulations,[4] to turn over to him all letters that arrived in Montgomery in petitioner's envelopes. Then he sent forged replies to petitioner's letters and made installment payments out of the money which petitioner had paid him in buying the notes. The dealer thus defrauded the Finance Company of some $34,000. The respondent Malone, on taking office as acting postmaster, had executed a bond for $16,000 to the United States as sole obligee with the respondent Surety Corporation as surety. The condition of the bond was:

> That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

In its complaint, without alleging specific authorization from the United States to sue, petitioner asked judgment on the bond for the defaults of Malone as postmaster. At the close of the testimony at the trial motions to dismiss the complaint were made by respondents and the district judge reserved judgment. After a jury verdict for petitioner the motions were granted. The Court of Appeals affirmed on the ground that a private user of the mails cannot maintain such an action as is here alleged without the consent of the United States, the obligee in the bond, and that no consent was given either by the statutes, expressly or by implication, or by any appropriate officer of the United States.

The respondent gave a statutory bond in compliance with an enactment of the Congress for the purposes specified in the statute.[5]

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[4] Postal Laws and Regulations (1932), § 777. "Mail matter should be delivered to the person addressed or in accordance with his written order . . . .

"2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. . . ."

[5] 39 U. S. C. § 34, Postal Laws and Regulations § 410:

"Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

As the bond is part of an integrated system of postal regulations, the determination of the parties authorized to sue upon it is a federal question governed by federal law.[6]

We agree with the Court of Appeals that there was no consent and that such consent is necessary. Consequently there is no occasion to determine whether the bond was intended to protect private users of the mail from all loss or damage, however consequential, occasioned by the postmaster.

The record shows the only effort made to secure consent of an officer was a request to the Attorney General for authority to sue. This was refused. Whether as a matter of right a third party may sue on the instrument for loss covered by an official bond running only to the statutory obligee depends upon the intention of the legislative body which required the bond. This intention may be evidenced by express statutory language or by implication. This was the rule announced in *Corporation of Washington* v. *Young*.[7] There a bond had been given to the Corporation of Washington, a municipality, by the manager of a lottery "truly and impartially to execute" his duties. Without the city's consent, the holder of a winning ticket sued on the bond. This Court said:

> No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment.

In *Howard* v. *United States*[8] this comment was made upon the *Young* decision:

> That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent.[9]

Such official bonds are often part of a general statutory plan for the operation of governmental activities. While all the activities of

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[6] James Stewart & Co. v. Sadrakula, No. 251, October Term 1939, decided January 29, 1940.

[7] 10 Wheat. 406, 409.

[8] 184 U. S. 676, 691.

[9] Cf. United States v. United States Lines Co., 24 F. Supp. 427; Moody v. Megee, 31 F. (2d) 117; United States *ex rel.* Brumberg Bros. v. Globe Indemnity Co., 26 F. (2d) 191, 193; Idaho Gold etc. Co. v. Croghan, 6 Idaho 471, 473; United States v. Griswold, 8 Ariz. 453, 456.

a government of course confer benefits on its citizens, frequently the benefits are incidental and unenforceable.[10] In the case of an official bond, even if its benefits are not incidental, it may well be that the legislative body is of the opinion that actions on the bond should be limited to the government in order to secure unified administration of claims.

We have recognized a similar need for a single control in regard to a sale bond required by a district court in an equity receivership. This Court in *Munroe* v. *Raphael*[11] had before it an injunction granted by a federal district court upon the motion of its receiver to rescind a consent to sue and forbid further proceedings in a suit in a state court in the name of the United States upon a sale bond of the estate in receivership. The sale bond had been given for assets purchased from the receiver. It ran to the United States only and guaranteed the payment of a certain percentage of indebtedness to all creditors of the estate. The suit had been instituted in the state court by one creditor, with permission of the district court obtained prior to the receiver's motion for injunction. This Court upheld the injunction on the theory that the bond, a part of the estate, remained within the control of the court and that to ensure ratable payments to all creditors one should not be permitted to carry on the litigation. In the opinion, it was declared: "Certainly no creditor could bring a suit in his own name on the bond, for his share of the purchase money. Nor could he institute such an action without leave of the District Court."[12]

Petitioner's attack is pointed at the application of the consent rule rather than at the rule itself. While with some other official bonds consent is given by express provision,[13] none is given in the postmaster bond statute. Petitioner urges that consent by

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[10] German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 231.

[11] 288 U. S. 485.

[12] *Ibid.* at 488; see District of Columbia, to Use of Langellotti, v. Fidelity & Deposit Co., 271 Fed. 383.

[13] 40 U. S. C. §270a-d (laborers and materialmen may sue on bond of contractor for government building); 22 U. S. C. § 103 ("any person injured" may sue on bond of consul); 22 U. S. C. § 78 (same as to bonds of consular officers acting as administrators in foreign countries); 22 U. S. C. §§ 170, 171 (same as to bonds of marshals of consular courts); 28 U. S. C. §§ 496, 500 (same as to bonds of U. S. marshals); 11 U. S. C. § 78(h) (same as to bonds of referees, trustees and designated depositories in bankruptcy); 7 U. S. C. §§ 247, 249 (same as to bonds of warehousemen under the Warehouse Act).

implication is given. Attention is called to the words "legal intendment" in the quotation from *Corporation of Washington* v. *Young* and to a comment upon the *Young* case in the *Howard* case that these words show that "consent may, under some circumstances, be assumed to have been given . . . . ."[14] These expressions are used to base an argument that the statutes and regulations of the postal service establish consent by intendment. The precedent chiefly relied upon for this position is the *Howard* case. This was a suit, without express consent of the United States, on a bond of a clerk of the district court, alleging breach by failure to pay over money deposited with the clerk in settlement of prior litigation. The bond was a statutory bond naming the United States as sole obligee and assuring that the clerk would faithfully discharge the duties of his office. This Court analyzed the statutory requirements and the "peculiar relation" of the clerk to the court to determine the intendment of the Congress as to the standing of the private litigant to sue on clerks' bonds. Consideration was given to the fact that "the great mass of litigation . . . has always been between individuals,"[15] that "the practice of a century" required a ruling that the bond covered them and that it could not be said of the clerk's bond, as it was said of the lottery bond, that it was given primarily for the governmental authority. This Court concluded that even though "generally speaking . . . in the absence of a statute" the obligation cannot be put in suit in the name of the obligee without his consent, the factors of custom, similarity of governmental and private use of the courts and the surrounding circumstances, in the absence of words declaratory of intention, evidenced an intendment to permit suit without consent on the clerk's bond. "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions."[16]

We conclude in the present instance, however, that circumstances, practice, statutes and regulations combine to forbid reading into

[14] 184 U. S. 676, 691.
[15] *Id.*, p. 687.
[16] *Id.*, p. 692.

this situation a "legal intendment" to permit suit without the consent of the United States. Assuming the bond declared upon here is intended to cover the users of mail service, its beneficiaries are legion in comparison with the users of a court's depository. Moreover, the United States has a very substantial interest in a postmaster's bond. The statutory duties of a postmaster require him to act as a fiscal officer for the government at his office. He is responsible for postal savings deposits, money orders, stamps, and salary disbursements as well as for the property of the service, buildings, mail bags and other equipment.[17] Such circumstances weigh against a holding that the Congress intended to let a private user of the mails, wronged by the principal of a postmaster's bond, sue wherever he might find defendants and gain for himself such priority on the bond as vigilance could obtain.[18]

Apparently it is not customary for the United States to consent to suit by mail users upon postmasters' bonds. No case has been called to our attention where such permission has been granted though the requirement for a bond has been in existence since 1825.[19] Rarely has a private individual sought recovery.[20] The contention of petitioner cannot be said to be supported by any continued administrative practice. On the other hand, the United States has undertaken repeatedly and successfully to recover on the bonds for the losses of mail users. Recovery has been allowed on the theory of a suit by a bailee for loss of property in his possession.[21]

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[17] Postal Laws and Regulations §§ 105-06, 443, 1626, 1408, 1426, 1430(21), 137, 235, 1866-70.

[18] In the absence of express legislation the government is not entitled to priority. See United States v. State Bank of North Carolina, 6 Pet. 29, 35; Mellon v. Michigan Trust Co., 271 U. S. 236, 239; United States v. Knott, 298 U. S. 544, 547.

The first statute permitting private suits on public contractors' bonds to the United States made no provision for government priority. 28 Stat. 278. By a later amendment private suits were forbidden until six months after completion of the contract and settlement of the contractors' accounts and the government was given priority. 33 Stat. 811; see Illinois Surety Co. v. Peeler, 240 U. S. 214, 217. The present statute requires two bonds, one for the government and a second for laborers and materialmen. 40 U. S. C. § 270a-d.

[19] Act of March 3, 1825, 4 Stat. 103.

[20] Cf. Wile v. United States Fidelity & Guaranty Co., 6 Alaska 48; Idaho Gold etc. Co. v. Croghan, 6 Idaho 471.

[21] National Surety Company v. United States, 129 Fed. 70 (C. C. A. 8); American Surety Company v. United States, 133 Fed. 1019 (C. C. A. 5); United States v. American Surety Company, 163 Fed. 228 (C. C. A. 4); United

There are over 44,000 post offices under the Post Office Department[22] and it is common knowledge that millions of items of mail go through them each year. It is rather obvious that numerous claims, many of them for small amounts, are likely to arise in the course of many transactions.[23] Under the Department's Regulations there is a fairly complete administrative formula for handling these claims from discovery to satisfaction.[24] These facts, along with the substantial interest of the government in the bonds, convince us that the Congress intended that claims on the bonds would be handled through the government rather than through various suits by individuals.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

States *v.* American Surety Company, 155 Fed. 941 (N. D. Ill.); Gibson *v.* United States, 208 Fed. 534 (C. C. A. 1); United States Fidelity & Guaranty Co. *v.* United States, 229 U. S. 397 (C. C. A. 8); United States Fidelity & Guaranty Company *v.* United States, 246 Fed. 433 (C. C. A. 9); United States *v.* United States Fidelity & Guaranty Company, 247 Fed. 16 (C. C. A. 6); United States *v.* Griswold, 8 Ariz. 453.

[22] Report of the Postmaster General, 1939, p. 126.

[23] Compare the Department's experience with claims on domestic insured mail during the fiscal year ending June 30, 1939. Payments were made in connection with 113,846 claims, and the average payment amounted to only $3.87. Report of the Postmaster General, 1939, p. 120.

[24] Postal Laws and Regulations § 816:

"The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.

"2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.

. . . . . .

"6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

"7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear."